

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT CINCINNATI**

UNITED STATES OF AMERICA,

Plaintiff,

:

Case No. 1:13-CR-025-7

- vs -

District Judge Susan J. Dlott

Magistrate Judge Michael R. Merz

CASEY BROCK,

Defendant.

:

**ORDER ADOPTING REPORT AND RECOMMENDATIONS ON
THE MERITS AND ON MOTION FOR OUT OF TIME DIRECT
APPEAL**

This criminal case is before the Court on Defendant Casey Brock's Motion to Vacate under 28 U.S.C. § 2255 (ECF No. 636). The matter was referred to United States Magistrate Judge Michael R. Merz (ECF No. 639) who filed a Report and Recommendations recommending that the § 2255 Motion be dismissed with prejudice ("Report," ECF No. 641). Mr. Brock has now filed Objections to that Report (ECF No. 646).

As required by Fed. R. Civ. P. 72(b)(3), the Court has reviewed the findings and conclusions of the Magistrate Judge and has considered *de novo* all of the filings in this case with particular attention to the issues as to which Petitioner has lodged objections. Having done so, the Court determines that the Magistrate Judge's recommendations should be adopted.

Mr. Brock seeks relief under Amendment 794 to the Sentencing Guidelines on the grounds he played a minor role in the criminal offense for which he was convicted. Magistrate Judge Merz noted that Mr. Brock's conviction became final long before Amendment 794 was adopted and that the amendment is not retroactively applicable to prior cases (Report, ECF No. 641, PageID 2301).

Mr. Brock objects, without any citation of authority, that "sister circuits have found that amendment 794 applies retroactively in direct appeals" and in the Sixth Circuit Court of Appeals USC § 2255 motions (Objections, ECF No. 646, PageID 2317).

Mr. Brock relies on *Clemons v. United States*, 102 Fed. Appx.933 (6th Cir. 2004). In that case the defendant sought a sentence reduction under 18 U.S.C. § 3582 based on Amendment 635 to the Guidelines. That case was an appeal from a denial of a motion for reduction of sentence under 18 U.S.C. § 3582, not 28 U.S.C. § 2255. The Sixth Circuit noted that § 3582 permits reduction of a sentence if an amendment to the Guidelines (1) lowers the sentencing range and (2) is among those amendments listed in § 1B1.10 which are to be given retroactive effect. Amendment 794 is not listed in § 1B1.10.

Mr. Brock also argues in essence that he agreed to the mandatory minimum sentence of 120 months because he was threatened with an enhanced sentence by the United States Attorney. No such claim is made in the § 2255 Motion. In the plea colloquy, Mr. Brock specifically swore that no threats had been made to get him to agree to plea guilty (Transcript, ECF No. 430, PageID 1289).

Mr. Brock's Objections are not well taken and are OVERRULED. The Magistrate Judge's Report and Recommendation is ADOPTED and the § 2255 Motion is DISMISSED WITH PREJUDICE. Because reasonable jurists would not disagree with this conclusion,

Petitioner is denied a certificate of appealability and the Court certifies to the Sixth Circuit that any appeal would be objectively frivolous and therefore should not be permitted to proceed *in forma pauperis*.

The case is also before the Court on Defendant's Petition for Out- of-Time Direct Appeal (ECF No. 645). Brock seeks to have applied the retroactive amendments to the Sentencing Guidelines adopted by the Sentencing Commission in Amendment No. 794 for mitigating adjustments for minor roles which he believes is retroactively applicable to persons with pending direct appeals. *Id.* at PageID 2307. The Magistrate Judge to whom the motion was referred recommended that it be denied (Report and Recommendations, ECF No. 647). Mr. Brock was notified of the deadline for filing objections and has not done so. Accordingly, the Report and Recommendations is ADOPTED and the Petition for Out-of-Time Direct Appeals is DENIED.

February 1, 2017

s/Susan J. Dlott

Susan J. Dlott
United States District Judge